87-41

Supreme Court, U.S.
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JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN H. BELAK, JACK KIBBE, GORDON R. STEINER, RAY E. VINTILLA and DONALD E. WEEKS,

Petitioners,

vs.

THE UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

JOHN R. VINTILLA
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QUESTION PRESENTED

DID THE DISTRICT COURT APPLY THE PROPER CRITERIA IN AWARDING AN ATTORNEY'S FEE TO A PREVAILING DEFENDANT IN AN ACTION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)?

PARTIES TO PROCEEDING

The parties to this proceeding are the following: John H. Belak, Jack Kibbe, Gordon R. Steiner, Ray E. Vintilla and Donald E. Weeks, and The United States Steel Corporation Plan for Employee Pension Benefits.

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The petitioners, John H. Belak, Jack Kibbe, Gordon R. Steiner, Ray E. Vintilla

and Donald E. Weeks, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 4, 1987.

OPINION BELOW

The opinion of the District Court for the Western District of Pennsylvania, which is reported in 642 F. Supp. 295, appears on the appendix hereto. The Court of Appeals rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 4, 1987. A timely petition for rehearing was denied on March 19, 1987. An extension of 30 days in which to file

the petition was granted. The petition was filed within 30 days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

> Section 1132(9)(1).
> In any action under this title (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

The material facts are not in dispute.

The petitioners sued the United States Steel Corporation Plan for Employee Pension Benefits in the United States

District Court for the Western District of Pennsylvania. The suit was brought under Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C., 1132(a)(1)(B). Petitioners sought to enjoin the wrongful withholding of pension benefits pursuant to the protective provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C., Section 1001, et seq.

The district court ruled in favor of the respondent. This ruling was affirmed by the Third Circuit without opinion. A Writ of Certiorari and petition for rehearing were denied by this Court, 106 Sup. Ct. 1791, 106 Sup. Ct. 2930, respectively. As a result, the respondent moved the court for an award of attorney fees and expenses under 29 U.S.C., Section 1132(g)(1). The district court granted

the respondent's motion and awarded the fees and expenses requested. This Order was brought to the Court of Appeals for the Third Circuit for review. That court affirmed the order below without opinion.

The petitioners are former management employees of Orinoco Mining Company in Venezuela (hereafter "OMC"), a subsidiary of United States Steel Corporation (hereafter "U.S. Steel"), now known as U. S. Diversified Group.

Upon termination of employment in Venezuela, the petitioners were entitled to a unique benefit mandated by Venezuelan law known as "Cesantia" and "Antiguedades" (hereafter ("C & A"), which was defined by the Labor Law of that country as an "unemployment aid" or "termination benefit." Petitioners are also covered by the United States Steel Corporation Plan for

Employee Pension Benefits (hereafter "Plan").

The nationalization of OMC by Venezuela resulted in the evential termination of all employees and led to the retirement of the petitioners.

Each of the petitioners is eligible to receive retirement benefits under the Plan. However, by virtue of a provision in the Plan, these benefits have been or are being withheld until the C&A monies paid to them upon termination of employment in Venezuela have been recovered.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW SUBSTANTIALLY ADDS TO THE RISKS INHERING IN LITIGATION, PUNISHES PLAINTIFFS WHO UNSUCCESSFULLY SOUGHT TO ENFORCE THEIR PENSION RIGHTS, AND MAY BECOME A STRONG DISINCENTIVE TO THE EXERCISE OF SUCH LEGAL RIGHTS.

Inasmuch as the Court of Appeals affirmed the ruling below, without opinion, the petitioners' arguments, of necessity, are directed to the decision of the district court.

Section 502(g)(1) of ERISA, 29 U.S.C., Section 1132(g)(1), provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." In this instance, it is significant that Congress did not automatically mandate an award to a prevailing party.

The issue presented is whether the district court abused its discretion in awarding attorney's fees to the prevailing defendant in an ERISA action.

In making the award of fees to the respondent, the district court considered five policy factors enumerated by the

Third Circuit in Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (1983). They are as follows:

(1) The offending parties' culpability or bad faith;

(2) The ability of the offending parties to satisfy an award of attorney's fees;

(3) The deterrent effect of an award of attorney's fees against the offending parties;

(4) The benefit conferred on members of the pension plan as a whole; and

(5) The relative merits of the parties' positions.

It is noteworthy that in Ursic, the court concerned itself primarily with the nature and amount of the fee award to a prevailing plaintiff, and did not

consider the policy factors outlined by it from the standpoint of an award to a prevailing ERISA defendant. Thus, the district court was without precise guidance from the appellate court as to the proper standard to be applied in making an award to a prevailing defendant. Nevertheless, on the basis of the "policy factors" of Orsic, the district court concluded that the defendant (respondent) was entitled to an award of attorney's fees.

With regard to policy factor number (1), the district court stated that while it cannot ascribe bad faith tothe petitioners' efforts to vindicate their ERISA rights, it did "find certain elements of culpability attributable to plaintiffs."

One such element, as found by the court, was that the filing of the instant

action "was a highly speculative venture in view of the strong adverse precedent of Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980)." The other element of culpability indicated by the court was that the petitioners improperly pursued U. S. Steel as a defendant in the district court in Ohio, and "attempted to thwart" the removal of the case to the Western District of Pennsylvania by "extra-ordinary appellate procedures."

It is ironic that the district court ultimately concluded that the petitioners' suit was "highly speculative," in view of the fact that the court had the principal case under consideration for nine months before it reached its decision. Yet, a cursory examination would have made such a conclusion immediately evident if such were the fact. The

incongruity of the district court's finding is seen further by its statement in the decision that "we have little direct guidance for determining the permissibility of set offs under ERISA."

Equally ironic is the court's view that the normal appellate remedies available and resorted to by the petitioners to obtain review of unclear and unsettled issues were "extraordinary procedures" improperly utilized by them.

It is true that the petitioners filed their action against the respondent on the basis of the Court's decision in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980). Alessi approved the set off of workers' compensation benefits against pension benefits. C&A, however, is totally unlike a workers' compensation award. It is a unique benefit created

by Venezuelan law, and payable only to employees of United States Steel Corporation in Venezuela (nationals and Americans alike). The Labor Law of Venezuela defines C&A as a "termination-of-employment benefit," or "unemployment aid."

The pension plan in issue provided for the deduction of a "severance payment or allowance" from pension benefits. Recognizing that the C&A money paid to the petitioners may be likened to a "severance allowance," such a connotation, nevertheless, does not alter in any way the nature and substance of the benefit as being an "unemployment benefit."

In Gilbert v. Roberts, 765 F.2d 320, (1985), one of the issues before the court was whether a severance pay policy

of the company constituted an employee welfare benefit plan under Section 3 of ERISA, 29 U.S.C, Section 1102 (1). The following observation of the Second Circuit regarding the nature of severance pay is especially enlightening.

> Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee -- whether fleeting or permanent -- is an inexorable consequence. Thus, in our view, severance pay is an unemployment benefit.
> (Underscoring ours.)

To hold that the petitioners engaged in a "highly speculative venture" in view of Alessi v. Raybestos-Manhattan, Inc., is fallacious. The Alessi case is the only decision of this Court that we have found, thus far, which has dealt with the

problem of permissible offsets against pension benefits under ERISA. Petitioners believe that the only rule which emerges clearly from Alessi is that a workers' compensation award is a permissible offset against pension benefits under ERISA. Had the petitioners' case involved a question of the integration of a benefit identical with workers' compensation benefit, the district court's finding that the lawsuit was a "highly speculative venture" in view of the Alessi ruling might be tenable. But, in light of the Court's statements in Alessi that "unemployment compensation" is not a permissible deduction under ERISA, and the characterization of a severance allow- as an "unemployment benefit" by the Venezuelan law and our courts, a substantial difference of opinion may exist on the

issue of the C&A offset. Nonetheless, the filing of the instant suit under these circumstances can hardly be considered "highly speculative."

The other elements of the "policy factors" considered by the court are either unsupported by the record or clearly untenable. Contrary to the district court's conclusion, nothing in the language of the pertinent statute indicates that the court must exercise discretion in a mechanistic fashion, awarding fees to all prevailing parties without regard for the congressional policies involved.

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), this Court declared that a "district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII

case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

Although Christiansburg involved a Title VII suit, the provision in that Act for an attorney's fee award to the prevailing defendant is substantially similar to the attorney's fee provision in ERISA. In both instances, the statutes provide for the allowance of an attorney's fee to either party at the discretion of the district court. Thus, in an ERISA action, as in a Title VII action, the question pertaining to attorney's fees is: under what circumstances should such fees be allowed when the defendant is the prevailing party? Both in Title VII and ERISA, the terms of the pertinent provisions of each Act provide no indication whatever

of the circumstances under which either a plaintiff or a defendant should be entitled to attorney's fees.

In Christiansburg Garment Co., this Court distinguished between the award of fees to plaintiffs and defendants, stating that there are at least two "strong equitable considerations" in awarding fees to plaintiffs that are "wholly absent in the case of a prevailing Title VII defendant." Id. at 418. First, the plaintiff is the "chosen instrument of Congress" for vindication of Congressional policy, and, second, in such a case, fees are awarded "against a violator of federal law." Id. at 418. Thus, a defendant stands in a different equitable position from that of a prevailing plaintiff.

The fact that the petitioners were unsuccessful in attempting to protect

their pension rights is not in itself a sufficient justification for the assessment of fees. The principal action was not brought contrary to firmly and well established principles. In the instant case, there is absolutely no reason to believe that the petitioners' action was frivolous, unreasonable, or without foundation. Indeed, the case involved novel and difficult questions of law not previously passed upon by the courts.

The standard set forth by this Court in Christiansburg Garment Co. v. EEOC was followed in Hughes v. Rowe, 449 U.S. 5. In Hughes, this Court declared that a civil rights defendant may not be awarded attorney's fees under Section 1988 unless the trial court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation." This

standard, petitioners believe, is the only fair basis for an award of attorney's fees to a prevailing ERISA defendant.

It would not serve the efforts of Congress to promote the vigorous enforcement of ERISA by discouraging suits in all but the clearest cases, and by inhibiting earnest advocacy in novel or undecided issues. The chilling effect of an attorney's fees award to a prevailing defendant would be disproportionate to any protection the defendant would receive against prosecution of such suits. In this respect, it is appropriate to recall Justice Stewart's observation in Christiansburg Garment Co., wherein he declared:

> In applying these criteria [that the plaintiff's action was frivolous, unreasonable or without foundation] it is important that a district court resist the understandable temptation to engage in post hoc reasoning by

> concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable.... Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

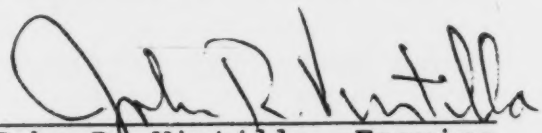
In view of the Congressional policy in enacting ERISA, it is clear that Section 502(g)(1) was not designed to punish unsuccessful plaintiffs who seek to protect their pension rights under ERISA. Rather as the chosen instruments of Congress, plaintiffs are encouraged to pursue their ERISA claims. Hence, a plaintiff should not be assessed an opponent's attorney's fees unless a court

finds that his claim is frivolous, unreasonable or groundless. No such finding was made by the district court in the instant case, as required by Christiansburg. Such a finding would be erroneous under the circumstances of the case, because novel and difficult issues were presented for adjudication. Moreover, the petitioners' interpretation of ERISA and the Alessi decision could not logically be considered frivolous, unreasonable or groundless. The district court thus exercised its discretion in awarding attorney's fees to the respondent in contravention of the standard enunciated by this Court in Hughes v. Rowe, and Christiansburg Garment Co.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,



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Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. E. VINTILLA, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 83-1034
UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS, Defendant.	)	

MEMORANDUM

Plaintiffs in this action were 25 former management employees of U.S. Steel Corporation employed in its Venezuelan subsidiary, Orinoco Mining Co. They were covered by the United States Steel Corporation Plan for Employee Pension Benefits, and in addition they were entitled to certain benefits under Venezuelan law in the nature of unemployment and severance benefits payable by the employer in a lump sum at the termination of employment.

Venezuela began steps to nationalize the industry which resulted in the retirement of many employees, including the plaintiffs.

U.S. Steel Corp.'s pension plan provided for severance benefits, which, if taken in a lump sum, would be set off against the noncontributory pension benefits until the set off was exhausted. All the plaintiffs here chose the lump sum benefit option. Under Venezuelan law, the Steel Company was required to pay these employees the unemployment aid and severance benefits. The total amount so paid by U.S. Steel was about $4,000,000 and several of the within plaintiffs received payments in excess of $200,000 each.

The Plan set off these amounts paid under Venezuelan law as severance benefits under the pension plan against the pension

payments. Plaintiffs filed this litigation under ERISA, 29 U.S.C. 1001, claiming that constituted a forfeiture or wrongful withholding of pension benefits.

In litigation in the Northern District of Ohio, the Court of Appeals for the Sixth Circuit, in this Court and in the Court of Appeals for the Third Circuit, defendant prevailed. Petitions for Certiorari to the United States Supreme Court were denied.

Defendants now move for attorneys fees and expenses pursuant to 29 U.S.C. 1132(g)(1) which provides in pertinent part:

> In any action under this title . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Guidelines for the exercise of the court's discretion are provided by judicial interpretation:

(1) The offending party's bad faith or culpability.

(2) The offending party's ability to pay the fee award.

(3) The deterrent effect of an attorney fee award against others acting under similar circumstances.

(4) Whether or not the party requesting attorneys fees seeks to benefit all perticipants or members of the ERISA plan.

(5) The relative merits of the parties' positions.

Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1980). No single criterian articulated in Ursic is decisive. They should be considered in balance and relationship to the others. Paddods v. Morris, 783 F.2d 844 (9th Cir. 1986).

We will consider these factors with

respect to the facts of this litigation.

Bad Faith or Culpability

While we cannot ascribe bad faith to plaintiffs' efforts, we do find certain elements of culpability attributable to plaintiffs. Plaintiffs' institution of this lawsuit was a highly speculative venture in view of the strong adverse precedent of Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980).

Plaintiffs are certainly culpable in their filing of the initial complaint in the Northern District of Ohio contrary to the provisions of the venue statute, 29 U.S.C. 1322(e)(2), in improperly naming U.S. Steel Corp. as a party defendant, and attempting to thwart its removal to this district by extraordinary appellate procedures. Plaintiff compelled the Defendant Plan to expend considerable time and

effort to defend against these ill considered actions. Thus, we find an element in favor of the award of counsel fees.

Ability of Offending Pary to Pay Counsel Fees

Individual plaintiffs received large sums in lump sum severance pay, several of them in excess of $200,000, two in excess of $300,000, for a total in excess of $3,000.000. They hoped to recover this amount again from the Pension Plan.

They were willing to pay expenses estimated at over $50,000 to finance their own litigation, and were aware that the Plan would be compelled to expend a substantial sum to protect the assets of the Plan held for the benefit of other beneficiaries. We find that the 25 plaintiffs are able to pay the defendants' legal fees and costs.

The Deterrent Effect

We believe that the deterrent effect will be beneficial upon those who contemplate litigation on thinly based grounds, particularly those whose expectations amount to a double recovery.

Benefit Resulting to All Participants or Members of the ERISA Plan

Defendants' actions were all directed to preserving the financial integrity of the Pension Plan. Their efforts saved the Plan from a libility for payment of over $3,000,000 from the Plan funds held for the benefit of all participants. The recovery of the legal expenses incurred will enhance the funds available for all participants.

Relative Merits

Plaintiffs' action brought in the Northern District of Ohio was ill

conceived, and its strenuous efforts to prevent removal were not justified. The defendants expended fees and costs of $5,337.30 in defending this ill grounded litigation.

With respect to the merits of the actions in this District Court and subsequent appeals, it appears to this court that the controlling precedent was strongly against plaintiffs' claim, and that the continued litigation was highly speculative, and in the final analysis represented an attempt to receive the same benefits twice, in today's parlance "double dipping."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAY E. VINTILLA, et al., Plaintiffs,	)	
v.	)	Civil Action No. 83-1034
THE UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS, Defendant.	)	

ORDER

AND NOW, this 8th day of August, 1986, it is hereby ordered that the Motion of Defendant United States Steel Corporation Plan for Employee Pension Benefits for an award of reasonable attorney's fees and costs pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. Section 1132(g)(1), is granted.

It is further ordered that the Plaintiffs shall pay to Defendant Plan fees in

the amount of $44,206.48, plus costs of $2,621.20.

It is so ordered.

/s/ Gerald J. Weber
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3549 & 86-3630

RAY E. VINTILLA, ROBERT S. LEVINGS. HENRY DRANE, on behalf of themselves and others similarly situated JOHN P. AYO; HENRY BAKKILA; JOHN H. BELAK; CHARLES G. BRINK; WALTER E. BROWN; NICHOLAS M. BUTLER; ROBERT H. CAMPBELL; JOHN H. CURRAN; LOY T. DIXON; HENRY M. DRANCE; JAMES A. DRISCOLL; WHEELER W. GREEN; WADE H. HARRELL; EDGAR D. HOSMER; JACK KIBBE; ELIZABETH A. LEAF; ROBERT S. LEVINGS; ROBERT A. MAZUR; DOUGLAS H. MITCHELL; GORDON R. STEINER; ANTHONY N. VALENTINE; RAY E. VINTILLA; DONALD E. WEEKS; ALTON G. WOODY; FREDERICK W. WRIGHT

v.

UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS

John P. Ayo, John J. Belak, Charles G. Brink, Edgar D. Hosmer, Jack Kibbe, Robert S. Levings, Robert A. Mazur, Douglas H. Mitchell, Gordon Steiner, Ray E. Vintilla and Frederick W. Wright,
Appellants in No. 86-3549

Robert H. Campbell, Appellant in
No. 86-3630

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civil No. 83-1034)

District Judge: Honorable Gerald J. Weber

Submitted Pursuant to
Third Circuit Rule 12(6)

Before: WEIS, BECKER, and HUNTER,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGES AND ORDERED that the judgment of the district court entered August 8, 1986 be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Weis
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

Date: March 4, 1987

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3549 & 86-3630

RAY E. VINTILLA, et al.

Appellants

v.

THE UNITED STATES STEEL CORPORATION
PLAN FOR EMPLOYEE PENSION BENEFITS

Present: WEIS, BECKER and HUNTER,
Circuit Judges.

O R D E R

Counsel John R. Vintilla's letter of March 7, 1987 is directed to be filed.

Treating the letter as a Petition for Panel Rehearing, and after consideration

thereof by each of the members of the panel, it is

ORDERED that the petition be and the same is hereby denied.

BY THE COURT,

/s/ Weis
Circuit

DATED: March 19, 1987